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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAVANNA MOHAMED BEY, Defendant and Appellant.	B271232 (Los Angeles County Super. Ct. No. BA419310)

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Lomeli, Judge. Affirmed.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, for Plaintiff and Respondent.

Ravanna Mohamed Bey (appellant) was charged with the murder of Jason Randle (Randle). (Pen. Code, § 187, subd. (a).)[1] It was alleged that appellant used a firearm in the commission of the crime for purposes of section 12022.53, subdivisions (b), (c), and (d), respectively. The jury found him guilty of murder in the first degree, and it found the firearm allegations to be true. He was sentenced to state prison as follows: 25 years to life, plus an additional 25 years to life under section 12022.53, subdivision (d), for a total prison sentence of 50 years to life.

On appeal, appellant contends the evidence is insufficient to prove he was the perpetrator of the murder; the trial court erred by denying appellant's motion for mistrial; the trial court erred by admitting text messages found on appellant's phone; he received ineffective assistance of counsel; and, due to cumulative errors, he was deprived of a fair trial.

We find no error and affirm.

FACTS

Prosecution Case

The murder took place during the night of August 7, 2010, at the apartment complex where Randle was living with his fiancée. Randle left his apartment to go the store and was shot minutes later near the apartment complex's back gate. No witnesses to the shooting testified, and appellant did not confess. Further, there was no evidence appellant knew or had ever met Randle. The prosecution presented a case based on inferences arising from the circumstances.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Events of August 7, 2010

In the late evening hours of August 7, 2010, about 20 or 30 minutes before the shooting, appellant and Mark Brown (Brown) approached Marcos Salazar (Salazar) and his friend "Sergio" near the front of the apartment complex. Appellant put a black gun with a laser site to Salazar's chest, asked the name of Salazar's gang, and asked why he was wearing a White Sox hat. Salazar was afraid for his life. Before getting an answer, appellant accused Salazar of being from the Rollin 60s, a Crip affiliated gang. Salazar denied affiliation with the Rollin 60s but then went on to say that he was from a crew called "SOK." Appellant said that wearing a White Sox hat means a person is from the Rollin 60s. He then said that if someone started shooting based on the belief that Salazar was a gang member, appellant and others "[were] going to have to retaliate and kill some of them." Brown, a Playboy Hustler Crip gang member from the "68 Set," said he knew Salazar and told appellant to leave Salazar alone. At some point, Brown told appellant to put the gun away because the police might see appellant with it. Appellant said he did not "give a f**k about the police," and that he would "shoot them too." Salazar thought appellant was insane, and that he might end up being killed by appellant.

Subsequently, Salazar heard appellant claim he was from 68th Street and the "Playboys" gang, and that he had been in the gang since the 1980's but had not "been around." According to appellant, he was not getting the respect he deserved. At that point, he stated, "But tonight you will see, I will redeem myself and I will show you who I am." Salazar understood this to mean appellant was prepared to kill someone. Appellant bragged that

he could kill a police officer, get in his car and be home in 45 minutes. He also said that nobody would find out.

Langston Brooks (Brooks) lived in the apartment complex. Prior to the shooting, he saw appellant in a group of eight or nine men by the back gate. Brooks did not know them. He assumed they were all Playboy Hustler Crips because no one else loitered there. Three or four minutes before the shooting, Brooks saw a group of four or five men with appellant; there was a beam illuminating the ground. Then Brooks saw appellant hold a black gun with an infrared scope in the air and fire a shot. Xavier Scott (Scott) heard gunshots while walking. Upon turning a corner and walking through the back gate, he saw six to eight men, including appellant. Scott noticed that appellant was holding a black nine-millimeter gun, and it appeared to Scott that appellant was angry. At trial, Scott testified that this was "about" 10:30 p.m. Jeremiah Dirks (Dirks) saw appellant with five or six men in the parking lot between the apartment complex's first and second buildings. Appellant was holding a black semi-automatic handgun and showing the weapon to others in the group. Brooks, Scott, and Dirks left the area. Soon after, they heard the gunshots that killed Randle.[2] Brooks came down the stairs to his apartment and saw Randle on the ground. And, according to Brooks, he saw "all them dudes who was back there" running away.

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[2] Scott and Dirks testified they went into their apartments and heard shots five to 10 minutes later. Brooks estimated that the time lapse between seeing appellant with the gun and the shooting of Randle was three to five minutes. The time lapse after he went to his apartment and heard the shots was 30 to 45 seconds.

When Randle's fiancée heard the gunshots, she exited their apartment and ran to the front of the apartment complex. She saw three African-American men running westbound on the street. One was light-skinned. Then she went to the back gate and saw Randle.

Police officers received a dispatch call at about 10:30 p.m. regarding a shooting. At the scene, they found Randle 10 or 12 feet inside the back gate. Onlookers informed the police that the "suspect" had fled westbound from the rear of the complex. Detective Refugio Garza found graffiti on a gate that read "Playboy Hustler Crips" and had an arrow next to it. The arrow signified that the "Huster Crips are here, this is our spot." Inside of the gate was another arrow with graffiti that read "Rabb Gang," which stood for Rabbit Gang and was connected to the Playboys. The graffiti also said "West Side Six Eight Playboy Crip." According to Detective Garza, "the marking itself looked fresh." On the wall inside the gate where Randle was killed there was graffiti that read "PBHC," which stood for Playboy Hustler Crip. The cartridge casings found at the crime scene and two bullets found in Randle's body were nine-millimeter caliber. The cartridge casings collected from the crime scene were discharged from one gun. The bullets had also been discharged from one gun.

Further Investigation

Detective Garza's investigation led to appellant for multiple reasons. He learned from Scott that the man with the gun was associated with the moniker "V-Money," and later learned that V-Money's phone number belonged to appellant. Detective Garza received information that this moniker was associated with the Playboy Hustler Crips. The crime occurred in a complex where

the Playboy Hustler Crips hung out, and Detective Garza thought a rival gang member would never walk into that apartment complex and target a victim without shooting everyone else who was standing there. Moreover, appellant mostly matched the description of the suspect provided by witnesses.[3] Detective Garza discovered that appellant used to live in the area, on 68th Street, which confirmed and gave credence to Salazar's statement that the man he spoke to said he used to live on 68th Street. Appellant did not live in the area, which is what Detective Garza heard about the suspect. When Detective Garza interviewed Brooks, he identified appellant in a photographic lineup. Brooks speculated that a gang leader named Hennessy told appellant to shoot Randle, and that appellant followed the order.

On December 19, 2013, the police chief for the City of Grover Beach arrested appellant and impounded his vehicle. Inside the trunk, the chief found a laser light system and a tactical flashlight, both of which could be mounted on a firearm. Later, when Detective Garza arrested appellant, he confiscated appellant's cell phone. On it, Detective Garza found two photographs that showed appellant making the sign of a rabbit. Detective Garza thought these photos were significant because they linked appellant to the Playboy Hustler Crip gang, which had graffiti at the apartment complex where Randle was killed. Detective Garza found text messages between appellant and Wes Wes, a Playboy Hustler Crip. The text messages were sent on or about the day a Playboy Hustler Crip was murdered. They indicated that appellant and Wes Wes were discussing a rumor

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[3] Brooks said the man had braids, which did not match appellant.

that Hennessy had been "let go" in an unspecified investigation[4] and that the police did not suspect the Playboy Hustler Crips.

Law enforcement examined cell phone records. They showed that on August 7, 2010, appellant's cell phone was in the Grover Beach area in the morning and eventually travelled south to the Los Angeles area where it continued to the area of the crime scene. After the shooting, appellant's cell phone moved north to downtown Los Angeles and then back south. Eventually, the call activity of appellant's phone tracked slightly west and north of the crime scene and stayed in one area into the early morning hours of August 8, 2010. Subsequently, the phone travelled north to Camarillo. By 11:24 a.m., appellant's phone was back in the Grover Beach area.

The cell phone records established, inter alia, that between 10:36 p.m. and 10:38 p.m., appellant's phone had contact respectively with the phones of Playboy Hustler Crip gang members Brown and Curtis Lee (Lee). Appellant's phone had contact with an unknown number ending in 9349 at 10:45 p.m. Then, at 10:47 p.m., appellant's phone was called by the phone of Tashana Prosser (Prosser), the ex-girlfriend of Lee. Between 11:00 p.m. and 11:10 p.m., there was contact between appellant's phone and the phone of LaTravell Washington (Washington), a woman who was in the same circle of friends as Lee, Prosser and appellant. The following morning, there was more contact between the phones of Washington and appellant as well as the phones of Brown and appellant. Appellant's phone was also in contact with three additional numbers that were never identified.

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[4] The record suggests that the prosecution assumed that Hennessy was a subject of the Randle murder investigation.

When interviewed, Washington denied talking to appellant and claimed that she had not seen him since the time they dated in high school.

On August 14 and 15, 2010, appellant's phone had call activity near the crime scene. A week after the shooting, there was a memorial service for Randle. Dirks saw appellant at the memorial.

Defense Case

Appellant did not testify.[5]

DISCUSSION

I. Sufficiency of the Evidence.

Appellant contends the evidence does not qualify as substantial evidence that he committed the murder. But as we discuss, the circumstantial evidence and reasonable inferences were sufficient to allow the jury to conclude beyond a reasonable doubt that appellant was the perpetrator. (*People v. Solomon* (2010) 49 Cal.4th 792, 811–812 [the record must contain substantial evidence from which a reasonable trier of fact could find a defendant guilty beyond a reasonable doubt]; *People v. Brooks* (2017) 3 Cal.5th 1, 57 ["'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence"'].)

For purposes of this appeal, appellant does not dispute that he was seen at the apartment complex prior to the shooting, and that he had a gun. His argument is that the evidence proved, at most, that he might be the killer or probably was the killer, and

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[5] The defense called multiple witnesses. Their testimony touched upon the issue of whether appellant was the man witnesses saw with a gun on August 7, 2010. His identity as that man is not in dispute on appeal.

that his conviction therefore violated the Sixth Amendment to the United States Constitution. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

Turning to specifics, appellant notes that other gang members were present before the shooting. Next, he posits that his statement that he wanted to redeem himself did not establish that he intended to kill someone. He adverts to dictionary definitions of the word redeem, including "to change for the better" and "to atone for," and thereby suggests he could have meant something virtuous and innocuous. He contends that his presence near the back gate prior to the shooting does not establish that he was there during the shooting. The fact that no one saw another person with a gun, in his mind, does not establish that his companions were unarmed. Based on this, he tacitly suggests one of his companions might have been armed, and might have been the shooter.

Appellant goes on to argue that firing a shot in the air prior to the shooting does not mean he is the killer. Though the evidence suggested he had a nine-millimeter gun, the same caliber as the cartridge casings and bullets found at the scene and in Randle, respectively, appellant argues that there was no evidence that a nine-millimeter gun was so unusual or unique that he was the only person who could have had one. While the cell phone evidence suggested that appellant fled from the scene, Brooks and Randle's fiancée saw multiple people fleeing. Accordingly, appellant says his decision to alight from the area proved only that he left the area at the same time as his companions. He discounts his threats to Salazar to shoot rival gang members and the police as empty because no rival gang members were shooting at Salazar and because no police were

present. Finally, appellant posits that the text messages with Wes Wes only proved that he was interested in the status of Randle's murder investigation, particularly the fact that the police let Hennessy go and were not focusing on the Playboy Hustler Crip gang.[6] Appellant claims he had nonincriminating reasons to be interested because he belonged to the gang, the

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[6] We note that after the trial court heard the content of some of the text messages, it stated, "[Y]ou have a real balancing problem under [Evidence Code] section 352. It doesn't show any consciousness of guilt with respect to this case. All it shows, all of what you've read [to] me, is that he's still associating with these individuals." The prosecutor stated that "three lines out of this is talking about the murder, when the individual tells [appellant] that he wants to keep [appellant] posted; that police officers stopped Hennessy, and everybody knew that Hennessy . . . was wanted in regard to [the] investigation" of Randle's murder. Defense counsel stated her belief that Detective Garza would offer an opinion that the text messages referred to the Randle investigation. But then she stated that the text messages made no reference to it. In his opening brief, appellant states, "The text messages showed the police had questioned Hennessy about Randle's murder, which suggested they were investigating Hennessy's role in the crime. The fact [that] appellant discussed the investigation's focuse[d] on Hennessy suggested he was interested because both of them were involved." But elsewhere in his opening brief, appellant states, "The trial court erred in admitting the text messages. The text messages were irrelevant because there was no substantial evidence that they related to Randle's murder and they should have been excluded under Evidence Code section 352 because they were confusing, misleading, and their prejudicial impact exceeded their probative value." It is unclear why appellant takes alternating and inconsistent positions on this matter. It appears his first and third position—that there was no connection—is correct.

murder occurred at a gang hangout, and he was in that location shortly before or at the time of the murder.

We view the evidence differently. Appellant, a gang member, expressed a desire for redemption and his gang's respect. Twenty or 30 minutes before the shooting, he indicated he would redeem himself that night. Also, he talked about killing rival gang members in retaliation if they started shooting because they believed Salazar was a gang member. Appellant proclaimed that if the police appeared, he would shoot them. He bragged that he could kill a police officer and then get away with it by being on the freeway and home in 45 minutes. Brooks saw appellant fire his gun in the air, and all the cartridge casings discovered at the crime scene came from the same weapon. From this evidence, the jury could have reasonably inferred that appellant intended to redeem himself by shooting someone that night and enhancing his gang reputation, that appellant's gun was the murder weapon, and that appellant was the person who shot and murdered Randle.

Other evidence bolstered the prosecution's case. For example, appellant fled the scene after the shooting, which suggested consciousness of guilt. (*People v. Price* (2017) 8 Cal.App.5th 409, 456.) In addition, by the time the police arrived at the murder scene, the Playboy Hustlers Crips had already marked the structures near the scene with graffiti to show the apartment complex was their territory. Some of the markings were fresh. This suggested appellant had carried out his intended plan by killing Randle, and that the gang acknowledged the murder with graffiti. After the shooting, appellant was in constant contact with gang members or it associates. In conjunction with the other evidence, this constant contact

suggested that he had an intense interest in the murder, which suggested his guilt. His intense interest was also suggested by his presence at Randle's memorial.

We conclude the evidence was sufficient to allow a jury to find appellant guilty beyond a reasonable doubt.

II. Denial of Mistrial.

Appellant contends the trial court erred when it denied appellant's motion for mistrial following an emotional outburst by Randle's fiancée.

A trial court should grant a mistrial if a defendant's chances of receiving a fair trial have been irreparably damaged, i.e., when the prejudice cannot be cured by admonition or instruction. (*People v. Silva* (2001) 25 Cal.4th 345, 372; *People v. Avila* (2006) 38 Cal.4th 491, 573.) "'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)

We find no abuse of discretion.

A. Relevant proceedings.

On Thursday, January 14, 2016, the matter was in the middle of trial. While the trial court and counsel were engaged in colloquy, and while the jury was present, Randle's fiancée addressed appellant and stated, "You ruined my life. You ruined everything, every single thing. If it wasn't for you, I would still have [Randle]."

The trial court told her to "hold on for a minute."

She kept talking, saying, "He ruined everything. He did. I know he did. My son, he just had his first basketball game and [Randle] couldn't be there."

The trial court addressed the jury, stating: "Ladies and gentlemen, let's go ahead and adjourn at this time. We'll see you on Tuesday. Have a good weekend."

The witness stated, "He's not here. He didn't come to see him. He's not here."

The jury was excused.

The trial resumed on Tuesday, January 19, 2016. Defense counsel indicated that she wanted to make a record. The trial court said, "No, not at this point," but was willing to allow a record to be made later.

Subsequently, the trial court invited defense counsel to make her record. She moved for a mistrial "because the behavior [Randle's fiancée] exhibited was very emotional. She was crying loudly in the court[room], accusing [appellant] that . . . this was his fault, he's ruined everything, pointing at him, while [both counsel] were at sidebar." In addition, defense counsel stated that Randle's fiancée came "down off the witness stand to just about [six] feet . . . alongside the jury box, and stopped there and was crying hysterically[.]"

The trial court denied the motion, noting that there was a jury instruction stating that sympathy, passion, and prejudice are not to be considered.

B. Forfeiture.

"'A defendant's failure to object to and request a curative admonition for alleged spectator misconduct waives the issue for appeal if the objection and admonition would have cured the misconduct.' (*People v. Hill* (1992) 3 Cal.4th 959, 1000.)" (*People v. Chatman* (2006) 38 Cal.4th 344, 368.)

When there is an emotional outburst, a court assumes "the prejudicial effect . . . may be corrected by judicial admonishment;

absent evidence to the contrary the error is deemed cured." (*People v. Martin* (1983) 150 Cal.App.3d 148, 163 [denial of mistrial affirmed in case where the trial court gave the jury an admonition].)

To the degree there was any prejudice to appellant, that prejudice would have been cured with an admonition given that the outburst was short in duration and not based on personal knowledge. Defense counsel did not ask for an admonition either the day of the outburst or the next day of trial. As a result, the issue was not preserved for appeal.

C. No Error.

As we have indicated, the outburst was brief and not based on personal knowledge. The trial court ruled within the bounds of reason by concluding that the jury instructions would cure any potential prejudice.

III. The Text Messages.

Appellant contends admission of a small portion of a text message exchange between himself and a fellow Playboy Hustler Crip gang member named Wes Wes should have been excluded under Evidence Code section 352 as unduly prejudicial. As we discuss, there was no abuse of discretion because the defense did not assert a timely objection. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.) In any event, even if there was error, we conclude that it was harmless.

A. Relevant Proceedings.

In a hearing outside the presence of the jury, the trial court considered a motion in limine by defense counsel objecting to the introduction of text messages found on appellant's phone that related, in part, to a person named Hennessy. The trial court stated it would admit the evidence if Detective Garza could

establish a foundation "that, at the time the statement was being made, Mr. Hennessy was . . . being . . . focused upon" as a suspect in Randle's murder. Defense counsel asked, "Do we know if Mr. Hennessy was being investigated for anything else?" The trial court asked Detective Garza, "Was he?" Detective Garza stated, "No." Defense counsel stated, "Okay, so not—not that the detective knows of." The trial court replied, "Well, the [trial] court has made its ruling, Counsel, and you've made your objections with respect to that. The [trial] court is satisfied with respect to that."

The evidence was as follows:

Dirks knew an individual with the nickname Hennessy, and had seen him with Brown, Lee and a person who went by the nickname S-Mak. Hennessy was a regular visitor at the apartment complex. When Detective Garza went through appellant's phone, he found a text message between appellant and Wes Wes, a Playboy Hustler Crip. The text was sent on or about June 1, 2013, which was the day a man named Lionel Douglas was murdered. He was Prosser's boyfriend and a Playboy Hustler Crip. The text message indicated that Hennessy had been let go, "that was . . . gossip," and "[t]hey are not on Playboys." Also, the text message stated, "Just to make this clear, bro, just Playboy put it in on thick." Detective Garza interpreted this last text message to mean the gang had the freedom to do whatever it wanted.

At no point did the prosecution or defense ask Detective Garza or any other law enforcement officer whether Hennessy was a suspect in Randle's murder.

The defense never objected that the prosecution had failed to lay the required foundation.

B. Forfeiture.

At the time the trial court ruled on the objection, it merely stated that the text messages were admissible if Detective Garza laid a foundation, i.e., established that Hennessy was a suspect in Randle's murder. Appellant does not argue that the trial court erred in this respect. Rather, appellant suggests that the trial court erred when it admitted the evidence. But defense counsel failed to interpose a lack of foundation objection, or to otherwise renew the Evidence Code section 352 objection. As a result, the objection to the text messages was forfeited. (*People v. Valdez* (2012) 55 Cal.4th 82, 122.)

According to appellant, the issue was preserved for review because the trial court indicated it had already ruled when defense counsel pointed out that Detective Garza did not know whether Hennessy was the subject of some other investigation. Appellant posits that the trial court's statement "amounted to a ruling that Detective Garza had established a sufficient foundation to introduce some of the text messages" into evidence. We cannot concur. When Detective Garza stated that he was not aware of Hennessy being the subject of any other investigation, it was not in front of the jury and was therefore not offered as evidence. At most, it was an offer of proof. It did not obviate the need for the prosecution to lay a proper foundation for the text messages. Moreover, Detective Garza never stated that Hennessy *was* a subject of the Randle murder investigation. Though no foundation was laid, appellant did not object at the time the issue was ripe.

People v. Morris (1991) 53 Cal.3d 152, 190 (*Morris*), is cited by appellant for the proposition that a contemporaneous objection at trial is not required if an in limine motion sufficiently

preserved an objection for appeal when "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context."

Instead of helping appellant, *Morris* establishes why appellant forfeited his objection. At the time the trial court initially ruled on the motion in limine, it stated it would allow the text messages in only if Detective Garza laid a proper foundation. Because he was not testifying during that hearing, the prosecution was not attempting to lay a foundation at that time, and it was not an appropriate context for the trial court to determine whether the text messages should, in fact, be admitted into evidence. The context was appropriate only at the time the prosecution elicited testimony regarding the text messages. Then and only then was the trial court in a position to determine if a foundation was laid.

C. No Prejudice.

Even if the objection was preserved and we concluded there was error, we would also conclude it is not reasonably probable that a result more favorable to appellant would have been reached in the absence of error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) At most, the evidence highlighted above showed that appellant was a Playboy Hustler Crip and was associating with another gang member. There was ample other evidence to establish that appellant was a gang member and associating with that gang based on witness statements and the cell phone records. As a result, the absence of the text messages

would not have materially changed the picture the jury had of appellant as a gang member.

Appellant suggests there was prejudice because in rebuttal argument to the jury, the prosecutor stated: "'The police stopped Hennessy and let him go.' Remember that text message? It's telling. They're all talking about this. They're involved in this. They're worried about who is going to get—who they are investigating." To the degree the prosecutor suggested the text message was relevant because Hennessy was a focus of the Randle murder investigation, that was merely an implication without evidentiary support because the text messages did not, in fact, suggest appellant's guilt.[7] Consequently, the prosecutor's argument did not cause prejudice.

IV. Ineffective Assistance of Counsel.

Appellant contends that defense counsel provided ineffective representation because she did not object to and move to redact the recording and transcript of Brooks's police interview to prevent the jury from hearing (1) his hearsay statements, (2) his speculative and irrelevant opinions that appellant shot Randle, and that Hennessy told appellant to do it, and (3) his

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[7] Appellant informs us that the "text messages showed the police had questioned Hennessy about Randle's murder, which suggested they were investigating Hennessy's role in the crime." Neither party, however, cited evidence that Hennessy was investigated for Randle's murder, or that appellant believed, or had reason to believe, that to be true. It is therefore unclear how this evidence could have caused appellant any prejudice. Again, we are confronted with appellant taking inconsistent positions as to whether the text messages were related to the Randle murder. Here, appellant suggests they were related. Elsewhere, he says the opposite.

speculation about the reasons why Hennessy told appellant to shoot Randle.

There is a two-prong test for ineffective assistance of counsel. A court considers whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If so, a court considers whether the defendant suffered prejudice to a probability sufficient to undermine confidence in the outcome. (*People v. Gamache* (2010) 48 Cal.4th 347, 391, citing *Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." (*Strickland*, *supra,* 466 U.S. at p. 697.)

As we discuss below, any inadequacies in representation did not prejudice appellant.

A. Relevant Proceedings.

The trial court held a pretrial discussion in chambers. Afterwards, defense counsel made the following record: "I . . . object[ed] to any hearsay and/or rumor evidence coming in as to who the shooter was."

On direct examination at trial, the prosecutor asked Brooks a series of questions about his observations shortly before the murder and his identification of appellant in a photographic

lineup. Brooks said he did not remember. Among other things, he testified he didn't remember whether he saw someone holding a gun outside the apartment complex before the murder, he did not remember talking to Detective Garza on November 13, 2013 while in prison, and he did not remember looking at photos on that date, circling photo number 2, and writing, "The guy in picture 2 was the guy I saw in the area the day of the shooting."

The prosecutor asked the trial court to declare Brooks a "hostile witness" and to allow her to play an audio recording of his interview with Detective Garza on November 13, 2013. The court granted both requests.

A transcript of the recording was distributed to the jury, and the recording was played. Defense counsel did not object to its admission or request that it be redacted.

Brooks said he hoped the police caught the killer, and that the murder had been on his mind because his kids still lived in the apartment complex, the "dude[s]" were still around, and the killer might be there "right now." Brooks described his experience on the night of the murder. Among other things, he said he was outside his apartment, smoking a cigarette, when he saw a group of about nine guys standing outside the back gate. The group contained people he had never seen with the Playboys before, including a light-skinned African-American male who had braids and wore a beanie. Hennessy was out there. Brooks saw the light-skinned African-American male holding a gun with a laser and shoot one round up into the air. After that, Brooks went inside his apartment, and a few minutes later heard the gunshots that killed Randle.

During the interview, Brooks identified appellant in a six-pack as the light-skinned African-American man who fired the shot in the air.

Brooks said he did not see "who pulled the trigger." But he thought it was appellant for a variety of reasons. Brooks knew that appellant was outside the back gate with a gun, and he did not know whether anyone else out there had a gun. He noted that earlier in the day of the shooting, appellant pulled a gun on Salazar and said, "I could kill you right now and be on the freeway and be back at my house in [forty-five] minutes and nobody would ever know." At another point, Brooks referred to the incident with Salazar and said appellant "brought a gun out on two innocent kids that day and told them he would kill them." Last, Brooks, believed the killer had to be someone who did not live there. Hennessy probably could not convince one of his "regular dudes" to kill Randle because they knew him and would not "have had the balls or heart."

Brooks said he investigated the murder himself. He could not get anyone to tell him who the gunman was. But, at various points, he did say: "All that shit happened behind [Randle] and Hennessy. He got into it with Hennessy. [¶] . . . [¶] Hennessy is one of . . . their main dudes or—well, one of their big homies. And I guess he didn't like the fact that he couldn't punk [Randle]." "I believe Hennessy told that dude to kill him. That's what I believe. I don't believe Hennessy killed him. I believe Hennessy told . . . [¶] . . . [¶] [w]hoever the light-skinned dude was." Still, Brooks did not know if Hennessy gave appellant such an order.

Per Brooks, he was told by "Bone," Randle's best friend, that three weeks before the murder, Randle and Hennessy had

an altercation during which Randle stood up to Hennessy and showed he wasn't afraid of Hennessy. Randle purportedly walked away from Hennessy and Hennessy followed him and waited by the stairs to see which apartment Randle went into.

Later in the interview, Brooks stated that he had been trying to figure out what happened "for the longest [time]." He speculated that when Randle came back from the store, "somebody said something to him. When he . . . was walking [into] the gate[,] . . . he probably turned around and said something back. Who knows? And they shot him."

In closing argument, the prosecutor stated, "Ladies and gentlemen, [Brooks] is corroborated by every other witness, and I'll give you some examples. [¶] [Brooks] says[,] 'That same guy that I saw with [Brown], he pointed a gun at that little Mexican guy, you know, the chubby guy in the apartment complex.' [¶] Who else did we hear that from? [¶] The Hispanic kid himself, [Salazar]." As further corroboration, the prosecutor stated, "[Brooks] said[,] 'Yeah, I talked to that Hispanic kid, and that Hispanic kid told me that this guy told him[,] 'I can kill you. I'm not from here. I can get on the freeway and be home and nobody would find out.'"

The jury deliberated over a three-day period, beginning late in the afternoon of January 25, 2016, and ending at about 11:30 a.m. on January 27, 2016. During deliberations, the jury sent the trial court three notes. The first note, which was sent at 10:22 a.m. on January 26, 2016, stated: "We would like a laptop to listen to the [Brooks] interview, and open the Nextel/Sprint spreadsheets." The jury was given a laptop and speakers. The second note, which was sent at 9:30 a.m. on January 27, 2016, asked: "Was a person ever associated with [a specific phone

number] during the trial? Were phone numbers for [Brooks] or Hennessy[ ] ever identified?" At 11:30 a.m., before the trial court responded to the second note, the jury sent a third note stating: "After further deliberation, the previously submitted questions were agreed unanimously by the jury [to be] irrelevant."

B. No Prejudice.

During deliberations, the jury asked questions and asked to hear Brooks's interview again. This suggests that the jury did not view the case as open and shut. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["Juror questions and requests to have testimony reread are indications the deliberations were close"].) Moreover, jury deliberations lasted a total of about eight hours. This further suggested the jury wrestled with whether to convict appellant. (*People v. Woodward* (1979) 23 Cal.3d 329, 341.)

Appellant contends that because this was a close case, and because defense counsel's representation was substantially deficient due to the lack of appropriate hearsay, relevance and Evidence Code section 352 objections, we are required to find prejudice. (See *People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [any trial court error "'of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant'"].)

Turning to specifics, appellant argues that Brooks's theories were "not mere harmless speculation. They likely appeared to be reasoned, persuasive inferences from facts that were admitted for their truth. Moreover, their impact on the jury was not nullified or mitigated by any admonition or instruction, since the [trial court] did not admonish or instruct the jury to ignore Brooks' theories or to view them with skepticism." Continuing on, appellant maintains that Brooks's theories

bolstered the prosecution's case because they answered three pivotal questions: Was appellant the killer? Why did he do it? Why did he kill Randle rather than someone else? Appellant contends that Brooks's theories bolstered the prosecution's case for the additional reason that he said he conducted his own investigation, and his conclusion that appellant was the shooter was the same as the police.

According to appellant, Brooks's account of appellant's confrontation with Salazar hurt appellant because Brooks made the incident appear worse. Brooks said appellant threatened to kill Salazar, and that appellant pulled a gun on two innocent kids and said he would kill them. On top of that, the prosecutor highlighted that version of events in her closing argument instead of Salazar's version.

The jury was instructed that motive is not an element of the charged crime. But it was also instructed that "you may consider motive or lack of motive as a circumstance of this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty." Appellant notes that the prosecutor argued that appellant could have targeted other people, and that his only goal was to redeem himself in the eyes of the gang. Then appellant states, "At least one juror may have found Brooks' theory of motive more convincing or more satisfying than the prosecutor's theory that appellant thought he would ingratiate himself with the gang by killing a random person who had no apparent quarrel with [this] gang and no apparent connection to any gang."

The prosecutor told the jury, "And [Brooks] had so much information from that neighborhood. [Brooks] can be characterized as the BBC of [the area], because he knew about

every neighborhood, who's doing what, who's up to no good." In her rebuttal, she said, "But the most telling thing is [Brooks], like I said, is like a newscast. He's like the Channel 7 of that area." Upon quoting these statements, appellant posits: "These arguments effectively assured the jury that [Brooks] was a respected, knowledgeable, reliable source of information and that his opinions were well-founded."

Furthermore, appellant contends that the jury might have believed Brooks's opinion because, during the interview, he appeared to be an unbiased witness who was genuinely outraged by Randle's murder and wanted to help bring the killer to justice. Also, appellant believes that when Brooks was recalcitrant at trial, the jury might have believed "that fear of the gang had gotten the best of him[.]"

Appellant adverts to the jury's request to listen to Brooks's interview, suggesting that it establishes the jury considered Brooks's viewpoints on the murder important. Appellant then states, "The fact[] that the jury asked whether Hennessy's phone number was ever identified and said it wanted to open the Nextel/Spring spreadsheets indicated it wanted to look for evidence of whether appellant spoke to Hennessy on the phone on the day of the murder. [Citation.] Thus, these jury notes showed the jury focused on the . . . statements Brooks made during his interview and particularly on his opinion that Hennessy ordered appellant to kill Randle."

We find no prejudice. In the interview, it was apparent Brooks did not have any personal knowledge to support his opinions about the identity of the shooter or the shooter's motivation. Consequently, we do not find it likely the jury gave Brooks's unfounded opinions much weight, and there is

insufficient probability that his unfounded opinion swayed the jury. Though there were no eyewitnesses to the murder, there was overwhelming evidence that appellant was the man who shot the gun into the air just prior to Randle's murder. Notably, the cartridge casings found at the crime scene came from the same gun. This suggested the gun appellant fired was the same gun that was used to kill Randle, and that appellant was the shooter. Other evidence implicated appellant, such as his membership in the Playboy Hustler Crips gang, his claimed desire to redeem himself with his gang, his flight from the scene of the crime, and his constant phone contacts with gang members and its associates in the aftermath.

Given the strength of the circumstantial evidence, we cannot say that confidence in the conviction is undermined by defense counsel's performance.

V. Cumulative Error.

When there is cumulative error, we must examine whether it rendered the trial fundamentally unfair and dictates reversal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Because there was no trial court error, and there was not more than one alleged instance of ineffective assistance of counsel, cumulative error analysis is unnecessary.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ